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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NEW YORK STATE THRUWAY AUTHORITY,

Petitioner,

—v.—

FRANK MANCUSO and ELLEN MANCUSO, Individually and on behalf of their children DEANNA and THERESA MANCUSO; F. MANCUSO BOATYARD, INC., d/b/a ECHO BAY MARINA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether certiorari should be granted to resolve the conflict between the decision below and other circuit court decisions on the means for determining when a single-state entity is entitled to Eleventh Amendment immunity?

2. Whether, given the confusion expressed by federal courts over the appropriate Eleventh Amendment analysis to apply to single-state entities following this Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), certiorari should be granted to determine the tests to be applied and the manner of applying them when determining whether a public authority is an "arm of the State?"

Parties

The parties to the proceeding are:

1. Frank Mancuso and Ellen Mancuso, individually and on behalf of their children, Deanna and Theresa Mancuso, and F. Mancuso Boatyard, Inc., d/b/a Echo Bay Marina, respondents;

2. The New York State Thruway Authority, petitioner.

The City of New Rochelle, New York, is a defendant in the district court action, but was not a party to the Second Circuit proceeding.

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IN THE

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No. __-____

NEW YORK STATE THRUWAY AUTHORITY,

Petitioner,

—against—

FRANK MANCUSO and ELLEN MANCUSO, Individually and on behalf of their children DEANNA and THERESA MANCUSO; F. MANCUSO BOATYARD, INC., d/b/a ECHO BAY MARINA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The decision of the Court of Appeals for the Second Circuit is printed in petitioner's appendix at pages 1a to 19a. It is reported at 86 F.3d 289 (June 13, 1996).

The opinion of the district court is printed in petitioner's appendix at pages 20a to 25a. It is reported at 909 F. Supp. 133 (S.D.N.Y. 1995).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 13, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

This case involves the Eleventh Amendment to the Constitution of the United States, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens, or Subjects of any foreign State.

This case also involves several provisions of the New York State Constitution, New York State Finance Law, New York Court of Claims Act, and New York Public Authorities Law, which are set out in full in petitioner's appendix at pages 26a to 113a.

Statement of the Case

Plaintiffs brought the underlying action against the New York State Thruway Authority ("NYSTA" or "the Authority") pursuant to the federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and New York State statutory and common law. The district court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

Plaintiffs have alleged, among other things, that NYSTA has unlawfully discharged pollutants into Long Island Sound via a storm drain that collects storm water runoff from a portion of the New York State Thruway. In a summary judgment motion, NYSTA claimed it was immune from suit as an arm of New York State under the Eleventh Amendment. The

district court rejected NYSTA's argument. 22a-23a; 909 F. Supp. at 135. The Second Circuit, on different reasoning, affirmed. 16a-17a; 86 F.3d at 296.

The facts material to this petition are those that relate to NYSTA's status under State law and its role in the State government. The Authority was created by the State in the early 1950's for the purpose of constructing and maintaining a State-wide highway, the New York State Thruway. The State Legislature has since expanded the Authority's mandate to include the management and maintenance of the 500-mile State canal system and certain other State roadways, and the financing of transportation projects throughout the State. N.Y. PUB. AUTH. L. §§ 350 *et seq.*

The State directs NYSTA to make specific expenditures for general State projects, relies on the Authority's credit in the bond market to raise funds for non-Thruway purposes, and takes measures to preserve the Authority's solvency. NYSTA also receives certain money through direct annual appropriations from the State legislature and statutory reimbursements.

Over the last two decades, NYSTA has been directed by the Legislature to raise capital to finance the construction, refurbishment, and maintenance of State roadways and transportation facilities. For instance, in legislation enacted at various times since 1972, the Legislature created programs for the State's transportation infrastructure which are funded through specified State tax revenue streams. N.Y. STATE FINANCE L. §§ 88-b; 89; 89-b; L.1987, c.13, § 5; L.1972, c.678, § 2; L.1991, c.329, § 1, as amended by L.1991, c.330, § 1; L.1993, c.56, § 35. The Legislature simultaneously authorized NYSTA to issue bonds, the proceeds of which are paid over to the State Department of Transportation ("DOT") or, upon DOT approval, to certain municipalities to finance the actual construction and maintenance work under agreements. In return, DOT was authorized to make payments to NYSTA from dedicated funds or legislative appropriations to cover the

principal, interest, and issuance costs of these bonds. N.Y. PUB. AUTH. L. §§ 376, 380, 385. In 1990, the Legislature amended PUB. AUTH. L. § 376 in order "[t]o assure the continued operation and solvency of the [NYSTA] by maintaining the Authority's debt reserve fund through payments from the State." L.1990, c.190, § 364, *amending* PUB. AUTH. L. § 376(5)(a)-(b). Under this provision, the State annually appropriates funds to NYSTA as may be necessary to cover the debt services on the bonds issued in support of these transportation programs. N.Y. PUB. AUTH. L. § 376(5)(a)-(b); *see also id.* at §§ 380(2)(b), 380(5), 385(2)(b), 385(5).

Similarly, in 1992 the Legislature directed that NYSTA "make available" $50 million for public works projects throughout the State, including the Syracuse inner-harbor project, the Buffalo waterfront development project, and the improvement of highway access to Stewart Airport in Orange County. N.Y. PUB. AUTH. L. § 384; L.1992, c.766. The Legislature has also directed NYSTA to assume control, operation, and maintenance of Interstate 287 and to enter into a financing agreement for the operation of that roadway conditioned on the issuance of bonds by NYSTA. L.1990, c.190, §§ 348, 350-351, 353-354.

Also in 1992, the State Legislature transferred control over the State canal system to NYSTA. L. 1992, c.766. In 1994, the Legislature authorized NYSTA to issue up to $60 million in bonds to finance the maintenance of the canal system, directed NYSTA to enhance funding for the canal, and appropriated $2.6 million to NYSTA for the maintenance and planning for the canal. N.Y. PUB. AUTH. L. §§ 382-383; L.1994, c.54, § 1 at p. 93.[1]

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[1] The construction of the canal system, the biggest public works project of its era, was financed exclusively by the State beginning in 1817. In appointing NYSTA as guardian of the Canal System, the Legislature found that NYSTA's jurisdiction over the system "will keep management and control over the canals with the state as required by the state constitution." L.1992, c.766, § 1; *see* N.Y. CONST. ART. XV(1)-(4).

At the same time that the Legislature directs NYSTA to take responsibility for various non-Thruway projects, it also allocates money directly to the Authority. In 1993, the Legislature appropriated $33 million of its federal highway funds allocation to NYSTA. L.1993, c.54, § 1 at p. 71. In 1994, NYSTA's direct appropriation was $32 million. L.1994, c.54, § 1 at p. 74. In 1995, the Legislature appropriated approximately $37 million to NYSTA. L.1995, c.54, § 1.

The Legislature draws on the Authority as a funding source for major public infrastructure projects. In 1993, the State Legislature enacted a financing plan for the State's transportation system. Under that legislation, NYSTA was authorized to issue up to $4 billion through fiscal 1996-97 in bonds for authorized state and local highway, bridge, aviation, and rail construction projects throughout the State.[2] The legislation requires NYSTA to pay over the proceeds of the bonds to the State. Meanwhile, through the annual State budget appropriation process, money is paid back to NYSTA to cover the bonds' principal and interest. N.Y. PUB. AUTH. L. §§ 385, 386; *see also Schulz v. State*, 84 N.Y.2d 231, 237-39, 616 N.Y.S.2d 343, 345-46 (1994). The Legislature has also authorized NYSTA to issue up to $40 million in special rail and aviation bonds to finance State Department of Transportation projects. N.Y. PUB. AUTH. L. § 386. The Legislature, in turn, appropriates money to pay NYSTA's debt service and certain other costs related to the financing. *Id.* at § 386(2).

Other financial inter-relationships also exist. The State Comptroller has custody over NYSTA's funds, N.Y. PUB. AUTH. L. § 364, must approve NYSTA bond issues, N.Y. PUB. AUTH. L. § 365(2), and has discretionary supervision over NYSTA's accounts, N.Y. CONST. ART. X, § 5; N.Y. PUB. AUTH. L. §§ 364, 2803. Moreover, as with the case of the

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[2] Legislation currently before the Governor for approval would, among other things, increase NYSTA's bonding authorization and extend the programs through fiscal year 1999-2000. N.Y. Assembly Bills Nos. 11336-a and 11340.

construction of the State canal a century before, New York State guaranteed $500 million in bonds for the construction of the Thruway, one of the biggest public work projects of its time. N.Y. CONST. ART. X, § 6; N.Y. PUB. AUTH. L. § 366. The last of these bonds were finally redeemed in July, 1995, two years after this litigation was commenced.

The Legislature created NYSTA to ensure the defense of the State and to promote commerce, N.Y. PUB. AUTH. L. §§ 352, 353, and the highway system built and maintained by NYSTA under this original mandate traverses almost every region of the State. The Legislature's transfer of responsibility for the 500-mile canal system and other highways to NYSTA further broadened its state-wide responsibilities.

NYSTA's governing board members are appointed by the Governor with the advice and consent of the Senate. N.Y. PUB. AUTH. L. § 352. Board members may be removed from office by the Governor and Senate as well for "inefficiency, neglect of duty or misconduct." N.Y. PUB. AUTH. L. § 2827. As discussed above, the State Comptroller disperses and may audit the Authority's funds and reviews NYSTA's proposed bond offerings. *Id.* at §§ 364 and 365(2). The Authority is required to make an annual report of its operations and financial condition to the Legislature, the Governor, the Comptroller, and the Director of the Budget. *Id.* at § 363.

NYSTA holds property "in the name of the State." N.Y. PUB. AUTH. L. § 354(4). The Legislature authorized NYSTA to acquire property through the exercise of the State's eminent domain powers. N.Y. PUB. AUTH. L. § 358-a. All of NYSTA's property will vest in the State upon the termination of the Authority's existence. *Id.* at § 352(4).

While NYSTA may sue and be sued under its governing legislation, the waiver of its sovereign immunity is limited. Thus, tort and contract claims may be brought against NYSTA only in the New York State Court of Claims and according to the same terms applicable to the State. *See* N.Y. PUB. AUTH.

L. § 361-b; N.Y. COURT OF CLAIMS ACT § 8. Furthermore, the State has structured NYSTA to exempt its property and income from State taxation. N.Y. PUB. AUTH. L. § 371. The Legislature has also exempted the bonds issued by the Authority from most State taxes. *Id.* at § 372. Similarly, the United States Internal Revenue Service views the Authority as a State entity and exempts both NYSTA's revenue and the interest paid on its bonds from federal taxation. 26 U.S.C. § 115; Appellate Record at 47.

The Authority also receives technical assistance and other services from other State agencies. N.Y. PUB. AUTH. L. § 362. Finally, the Authority's employees are protected under the State's Civil Service Law and are treated the same as employees of State departments for purposes of transfers, promotions, and seniority calculations within and among all State agencies. *Id.* at §§ 354(6) and 355.

The Decision Below

The Second Circuit began its analysis with reference to this Court's decisions in *Lake Country Estates, Inc. v. Lake Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), and *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), and the various "indicators of immunity" identified in those decisions. The court recognized that there are two rationales that underpin the Eleventh Amendment—protecting the State's sovereign dignity and protecting the State's fisc. 9a-10a; 86 F.3d at 293. It then noted, however, that protection of the State's fisc will control where the indicators of immunity are evenly balanced even in the instance of a single-state entity. *Id.* The court examined six indicators: (1) how the entity is referred to; (2) how the entity's governing members are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of the local or State government; (5) whether the State has a veto power over the entity's decision; and (6) whether the

entity's obligations are binding upon the State. *Id.* After concluding that the factors were evenly balanced, the court stated that the sovereign dignity concern was "not fully implicated" because NYSTA was not a "traditional" State agency. 17a; 86 F.3d at 296. Since the State was not obligated to pay a possible judgment against the Authority, NYSTA was not entitled to Eleventh Amendment immunity. 8a-17a; 86 F.3d at 293-96.

Reasons For Granting The Writ

I.

The question of how to determine whether an agency like the Authority is entitled to Eleventh Amendment immunity as an arm of the State raises an important issue with respect to which the Courts of Appeals are in conflict. Unfortunately, this Court's decision in *Hess* has engendered confusion among the lower courts in dealing with single-state agencies even though the *Hess* case dealt with a bi-state, Compact Clause entity. As the Court in *Hess* observed, bi-state entities "occupy a significantly different position in our federal system than do the States themselves." 115 S.Ct. at 400. The ruling below ignored this distinction, conflicts with other circuits' analyses, and improperly restricts the State's sovereign immunity. The issue in this matter is of substantive importance because States need to know what structures of government are entitled to Eleventh Amendment immunity in order to plan and implement the most efficient forms of State government consistent with each State's policies on the assertion of sovereign immunity.[3] Consequently, the Court should

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[3] As Justice O'Connor recognized, autonomy in planning is a crucial attribute of state sovereignty. "If a State were vulnerable at any time to retroactive damage awards in federal court, its ability to set its own agenda, to control its own internal machinery, and to plan for the future—all essential perquisites of sovereignty—would be grievously impaired." *Hess*, 115 S.Ct. at 410 (O'Connor, J., dissenting).

grant certiorari to resolve the conflict and remove the lower courts' confusion.

This Court has held that the Eleventh Amendment bars suits in federal court not only against a State itself, but also against a State agency and any other governmental entity characterized as an "arm of the State." *Mt. Healthy City Sch. Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977); *Monell v. Department of Social Services*, 436 U.S. 658, 690 n. 54 (1978). By contrast, political subdivisions of a State, such as municipalities and counties, are not entitled to Eleventh Amendment immunity "even though such entities exercise a 'slice of State power.' " *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 401.

In *Hess*, the Court addressed whether a subsidiary of the New York New Jersey Port Authority, a bi-state or "Compact Clause" entity, was entitled to Eleventh Amendment immunity as an "arm of the State." The *Hess* majority opinion identifies "twin" guiding concerns behind the Eleventh Amendment: (1) respect for a State's sovereign dignity; and (2) protection of a State's treasury and finances. 115 S.Ct. at 400, 404. The *Hess* opinion, however, did not address what constituted interference with a "State's sovereign dignity" because the defendant in that case was a bi-state entity and therefore suit against it did not implicate issues of "sovereign dignity." 115 S.Ct. at 400-401. Because there was no need, the Court also did not determine how to weigh the two concerns when both were implicated.

The Eleventh Amendment test applied by the Second Circuit did not respect the underpinnings of Eleventh Amendment jurisprudence which are applicable to single-state created entities. While the Second Circuit did identify two rationales that underpin the Eleventh Amendment, it then devalued one of the two—sovereign dignity—by providing that protection of the treasury "will control" in close cases. 10a; 86 F.3d at 293. This devaluation is even more ques-

tionable given the lower court's failure to acknowledge the Legislature's repeated directives to NYSTA to maintain and fund the State canals and highways, N.Y. PUB. AUTH L. §§ 376, 379-386, and the State's ability to appoint and remove NYSTA's board members, N.Y. PUB. AUTH L. §§ 352, 2827. The lower court's analysis was further marred by its inexplicable statement that NYSTA is not a "traditional" state agency—a concept that the lower court does not define or state why such a characterization is significant.

Further, the court ignored the practical interrelationships between NYSTA and the rest of State government, concluding that because the State treasury was technically not liable for most debts and other liabilities of NYSTA, there could be no impact on the public fisc. 16a; 86 F.3d at 296; *compare*, *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051, 1054 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 514, 133 L.Ed.2d 423 (1995). Contrary to the court's reasoning below, were plaintiffs to recoup the $105 million in damages that they claim, NYSTA's bond rating could very well be adversely affected, resulting in higher debt service and interest costs to the Authority. Furthermore, an award of such magnitude would cause significant problems for NYSTA in meeting its obligations to maintain and operate I-84 and I-287. If NYSTA's abilities were so compromised, the State would still be responsible for the mandated maintenance and operation function, which would be payable directly from the State treasury. L.1990, c.190, § 350; L. 1991, c.53, § 11; *compare Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1441 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3001 (June 24, 1996) (No. 95-2060) (recognizing that even if the college could initially satisfy a judgment, the judgment would produce a higher budgetary shortfall).

The Second Circuit's approach in placing primary reliance on the effect that a judgment against an agency may have on the State treasury in determining whether an agency is entitled to Eleventh Amendment Immunity is in direct conflict

with the decision of the Seventh Circuit in *Thiel v. State Bar of Wisconsin*, ___ F.3d ___, No. 95-3442, 1996 WL 496629 (7th Cir. Sept. 3, 1996), although consistent with *Christy v. Pennsylvania Turnpike Com'n.*, 54 F.3d 1140 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 340, 133 L.Ed.2d 238 (1995). It is also inconsistent with the approach of the Fourth Circuit in *Ristow v. South Carolina Ports Authority*, *supra*.

In *Thiel*, the Seventh Circuit decided that the Wisconsin State Bar was entitled to Eleventh Amendment immunity as an arm of the State. The Wisconsin Supreme Court created the Bar in 1956. It controls Bar dues and its budget through rule-making, establishing deadlines within which members must enroll and pay dues, penalties for nonpayment, and limitations on the use of dues monies. The Wisconsin Supreme Court requires the Bar to include in the dues adequate funds to pay the costs of legal education activities and professional oversight and has specified the manner in which the Bar conducts its daily business and establishes its governance. The court has ultimate authority to review amendments to the Bar's bylaws. 1996 WL 496629 at *2. The Bar, however, may sue and be sued, enter into contracts, buy or dispose of real and personal property in its own name, maintain bank accounts in its own name, and handle its own personnel matters itself. Its governing board is elected by its membership and operates the Bar without daily oversight by the court. 1996 WL 496629 at *3.

On the basis of these facts, the Seventh Circuit concluded that the Bar was entitled to Eleventh Amendment immunity. *Id.* Unlike the court below, however, the *Thiel* court did not examine what impact a judgment might have on the State treasury, instead explaining that "the effect on the State treasury was the *least important* of the three factors, and would be irrelevant if the first two weigh in favor of Eleventh Amendment immunity." 1996 WL 496629 at *3 (emphasis added), citing to *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1402 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114

S.Ct. 2138, 128 L.Ed.2d 867 (1994). As to the other two factors—the extent of control the Wisconsin Supreme Court exercised over the Bar and whether the Bar acted as the agent of the court when it promulgated the rule in question—the Seventh Circuit concluded that sufficient control had been exercised and that the Bar was acting as an agent. As a result, the Circuit did not even "consider whether a judgment against the Bar would be satisfied by State funds." 1996 WL 496629, *3. Indeed, the Seventh Circuit did so in the face of findings of the court in *Levine v. Supreme Court of Wisconsin*, 679 F.Supp. 1478, 1487 (W.D.Wis. 1988), *rev'd on other grounds*, 864 F.2d 457 (7th Cir.), *cert. denied*, 493 U.S. 873 (1989), that the Bar was an autonomous institution and that "[a] judgment against the State Bar would not affect the state treasury." *See*, *Thiel* at 1996 WL 496629 at *7 FN3.

In contrast, the result in this case turned on whether the State was liable for a judgment against NYSTA. 15a-17a; 86 F.3d at 296. In addition, while the Seventh Circuit concluded that the supervisory oversight of the Wisconsin Supreme Court constituted "sufficient" State control over the Bar to trigger immunity, here the Second Circuit rejected that conclusion despite much greater State oversight and control in the affairs and governance of the NYSTA. 10a-16a; 86 F.3d at 295-6; *compare*, *Levine v. Supreme Court of Wisconsin*, 679 F.Supp. at 1480-82, 1487-88.

In *Ristow*, the Fourth Circuit accorded Eleventh Amendment immunity to the South Carolina Ports Authority. Instead of determining whether the State would be liable as a matter of law in the event of a judgment against the authority, the major factor utilized by the court below, the Fourth Circuit conceded that "in the strictest sense there is no legal obligation by the State of South Carolina to cover the Ports Authority's debts." 58 F.3d. at 1054. Nevertheless, the Fourth Circuit determined that the South Carolina Ports Authority was entitled to Eleventh Amendment immunity because "practicably . . . a judgment against the Ports Authority

involves the 'core concern' of the Eleventh Amendment—the ebb and flow of funds in and out of South Carolina's treasury." *Id.* at 1054-55. In conducting this "practical analysis" of the "continuing picture," the Fourth Circuit noted that South Carolina had provided funding for threnovation of port facilities, *id.* at 1053-54, and over the authority's lifetime had withdrawn funds from the authority, *id.* at 1054.[4] In contrast, despite the existence of similar factors, ranging from the initial State constitutional guarantee of $500 million in bonds, the regular infusing of monies into NYSTA, and the Legislature's reliance on the Authority as a source of funds for State projects, the court below concluded that a judgment posed "no threat" to NYSTA and rejected immunity.[5]

II.

The need to resolve the conflict among the circuits is heightened by accelerating changes in State governmental structure that will require the courts to apply an "arm of the State" test to a multitude of state-created entities, and by the confused reaction of the lower courts to *Hess*. The lower court's emphasis on a traditional and narrow view of the State

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[4] On the issue of control the Fourth Circuit has stated "we believe that in many instances the degree of State control over the particular entity will be sufficiently clear to render the degree of control a substantively meaningful factor in the overall calculus. This is particularly true where the question is only whether the entity is only under State or local control and not which among a number of 'multiple creator-controllers' is actually in control, as is the question with compact clause entities." *Gray v. Laws*, 51 F.3d 326, 432 n. 3 (4th Cir. 1995).

[5] The import of the Second Circuit's "no threat" test is disturbing. If NYSTA has a series of poor years where the Legislature is required to infuse money into the Authority, *see, e.g.*, N.Y. PUB. AUTH. L. § 376, would NYSTA become "an arm of the State" until it recovered its fiscal stability? Would suits demanding only small judgments proceed in federal court while those demanding large amounts be barred? The opinion below is silent on these issues raised by the court's reasoning.

treasury—essentially reducing the question to whether the State must write a check against its general funds to cover the debts of the entity claiming "arm of the State" status—ignores the reality of modern State governance. The "State treasury" is no longer a single vault in the basement of the Capitol; rather, States employ numerous funds, accounts, and trusts, often interconnected, in order to finance State projects and federally-mandated programs. This restrictive view, coupled with uncertainty concerning how to evaluate the State "dignity" element of Eleventh Amendment underpinnings, contributes to the lower courts' confusion and consequent conflicting approaches and results. Indeed, giving proper weight to the State sovereignty concept would require acknowledging the immunity of many of these entities, as the preservation of the States' autonomy in organizing and financing their public undertakings must be a core concern of the Eleventh Amendment.

Here, not only has the State clothed NYSTA with many elements of the State's own identity and charged it with the execution of a state-wide public function, but the State relies on NYSTA as an integral component in the planning, financing, and implementing of state-wide transportation facilities. Thus, in a practical sense, it is impossible to view the State's funds as entirely separate and insulated from NYSTA's finances and financial condition. The test applied by the Second Circuit failed to appreciate these factors.

While *Hess* provides the lower courts with a roadmap for determining whether a bi-state entity is entitled to Eleventh Amendment immunity, the lower courts by their own admission have become confused when attempting to apply the Court's analysis to single-state creations. For example, in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995), the Fourth Circuit characterized *Hess* as "an opinion that is certain to generate confusion." *Id.* at 431. The Fourth Circuit complained that while the *Hess* Court, which was only addressing Compact Clause entities, identified considerations the circuit

considered relevant to single-state created entities, "[The Supreme Court] did not offer any guidance as to how to apply any of the various factors in that context." *Id.* at 433.

Other circuits have also noted since *Hess* that "[t]he jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused." 8a; 86 F.2d at 293 (2d Cir.); *see, e.g., Hadley v. North Arkansas Community Technical College*, 76 F.3d at 1443 (8th Cir.) (Lay, J., dissenting) ("Today's decision amplifies the disarray of approaches applied by lower courts when confronted with the defense of Eleventh Amendment immunity by state-created entities. Little would be served by setting forth the diverse reasoning of this Court or other courts. These cases are already of historical record."); *Ristow v. South Carolina Ports Authority*, 58 F.3d at 1053 n.4 (4th Cir.) (court declines to "attempt to interpret" *Hess*' sovereignty discussion); *see Pillsbury Co. v. Port of Corpus Christi Authority*, 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1705, 134 L.Ed.2d 803 (1996) (court stated that *Hess* did not apply in single-state context).

The Second Circuit's restrictive view, coupled with uncertainty concerning how to evaluate the State "dignity" element of Eleventh Amendment underpinnings recognized in *Hess* even in the bi-state context, will add to the lower courts' confusion and consequent conflicting approaches and results. Indeed, giving proper weight to the State sovereignty concept would require acknowledging the immunity of many of these entities, as the preservation of the States' autonomy in organizing and financing their public undertakings must be a core concern of the Eleventh Amendment. As Justice O'Connor stated in *Hess*, "We have always respected state flexibility in setting up and maintaining agencies charged with furthering state objectives." *Hess*, 115 S.Ct. at 411 (dissenting), citing *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

As a consequence, States cannot predict whether the lower courts will find that the single-state entities they have created or may create are entitled to Eleventh Amendment immunity, an important consideration in planning the structures of State government. This issue is particularly important because State governments have been compelled to diversify their functions and to develop new means of financing the programs demanded by their citizens or delegated to them by the federal government. *See*, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM.L.REV. 1243, 1247-51 (1992); *see also* L.1972, c.678, § 1 (in authorizing NYSTA to issue bonds, Legislature made finding of State financial crisis and pressing need to finance essential highway construction and repair projects).[6]

With the diversification in government structures and the increasing demands on States, courts are presented with new kinds of entities that share aspects of their creating States' identity (such as political accountability or State law immunity) and that also have varying degrees of financial relationship to their creators. Many of these entities are intentionally self-financing, despite their obvious governmental functions and State agency characteristics. Thus, given the confusion of the lower courts, their Eleventh Amendment immunity is unsettled.

For these reasons, this Court should grant certiorari to resolve the conflict and confusion in the circuits regarding the tests to apply and how they are to be applied when determining whether a single-state entity is an arm of the State.

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[6] New York is among many states that have utilized public authorities to meet the demands of modern state government. 92 COL. L. REV. at 1250 n. 32; *see Schulz v. State of New York*, 84 N.Y.2d at 241-47, 616 N.Y.S.2d at 347-51 (summarizing the history of the State's efforts to finance governmental activities through its public authorities).

CONCLUSION

The Court should grant a writ of certiorari in this matter to resolve the conflict among the lower courts and to provide essential guidance to the lower courts when deciding whether a single-state created entity is an "arm of the State."

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Respectfully submitted,

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